U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 03 March 2005

Case No.: 2003-LHC-897

OWCP No.: 07-164784

IN THE MATTER OF

CARNELL GREEN,
Claimant

vs.

ADM/GROWMARK RIVER SYSTEM, INC.,
Employer

APPEARANCES:

KEVIN KLIBERT, ESQ.,
On Behalf of the Claimant

ALAN G. BRACKETT, ESQ.,
On Behalf of the Employer/Carrier

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq., (the "Act" or "LHWCA"). The claim is brought by Carnell Green, "Claimant," against ADM/Growmark River System, Inc. ("ADM"), "Employer." Claimant alleges that he sustained a shoulder injury on May 28, 2002 while working at ADM. Employer disputes timeliness of notice, causation of the injury and nature and extent of disability. A hearing was held on September 30, 2004 in Metairie, Louisiana, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

1) Joint Exhibits No. 1; and

2) Respondent's Exhibits Nos. 1-10; and

3) Claimant's Exhibits Nos. 1-3, 6.[1]

Upon conclusion of the hearing, the record remained open for the submission of post-hearing briefs, which were timely received by both parties. This decision is being rendered after giving full consideration to the entire record.[2]

STIPULATIONS[3]

The Court finds sufficient evidence to support the following stipulations:

1) Jurisdiction is not a contested issue. Claimant was and is employed as a laborer at a grain elevator on the Mississippi River in Ama, Louisiana, engaged in the loading and unloading of grain from and to vessels.

2) Employer was advised of the injury on July 29, 2002.

3) Notices of Controversion were filed on August 16, 2002; November 18, 2002, and January 9, 2003.

4) An Informal Conference was held on January 8, 2003.

5) Claimant's average weekly wage at the time of injury was $687.01.

6) No disability benefits were paid.

7) The date of maximum medical improvement was January 2, 2004.

ISSUES

The unresolved issues in these proceedings are:

(1) Timeliness;

(2) Fact of Injury and Causation;

[1] Respondent's objection to CX-7 is hereby sustained, because Claimant did not supplement the letter from Blue Cross with an itemized list of medical expenses. Therefore, CX-7 is not admitted into evidence.
[2] The following abbreviations will be used in citations to the record: JX - Joint Exhibit, CX – Claimant's Exhibit, RX – Employer's Exhibit, and TR – Transcript of the Proceedings.
[3] JX-1.

(3) Nature and Extent of Disability;

(4) Medical Expenses; and

(5) Attorney's Fees

SUMMARY OF THE EVIDENCE

I. TESTIMONY

Carnell Green

Mr. Green is 59 years old and has a high school education. TR 14. His work history includes employment at United Gas Pipeline as a maintenance man, truck driver and corrosion technician. TR 15. He became an employee of ADM in 1994 and has worked as a maintenance man, cover handler and oiler. TR 16-17. At the time of his alleged injury, he was working as an oiler. Mr. Green explained that an oiler greases machinery throughout the facility, carries a five-pound gallon [sic] bucket of oil and does significant climbing while carrying the bucket. TR 18-19. He testified that he typically works by himself. TR 19.

Mr. Green testified that he injured himself at 2:30 p.m. on May 28, 2002. TR 21. He explained that as he was swinging his oil bucket to lift it up onto a step, he felt something come loose and sting in his right shoulder. TR 22. He testified that he was aware that the company policy was to report accidents as soon as they happened, but he did not report the incident because he did not think the injury was serious. TR 20, 22. Additionally, he testified that his supervisor, Mr. John Minard, was at another area of the facility and typically left at 3:30. TR 23. He testified that he continued working with minimal exertion until the end of his shift at 5:00. TR 56. Mr. Green testified that he felt it necessary to report the injury the next evening before he went home, and he approached Mr. Minard at the water cooler. TR 23. He testified that he showed Mr. Minard what had happened to his back and asked him to make a notation of the injury, explaining that he would come back to file an accident report if the injury worsened. TR 23. Mr. Green testified that he did not want to unnecessarily file an accident report because he was trying to keep the injury off of the record. TR 24. He testified that Mr. Minard had encouraged him not to get injured so that Mr. Minard would qualify for a raise. TR 24.

Mr. Green testified that he initially took some of his son's pain pills. TR 24. On June 3, 2002, he saw Dr. Green at Ochsner Clinic and complained of diarrhea. TR 24. However, he testified that he also told Dr. Green he had been injured at work. TR 25. He testified that Dr. Green looked at his shoulder and told him to return for x-rays in two weeks. TR 26. Dr. Green eventually referred him to Dr. Meyer for surgery. TR 26. Mr. Green testified that he asked Mr. Minard to file an accident report on July 29, 2002,

before he went to see Dr. Meyer. TR 29, 50. At the hearing, Mr. Green acknowledged that the date of the accident on the report was June 26, 2002 and speculated that Mr. Minard must have made up that date. TR 50. Mr. Green, however, insisted that May 28, 2002 was the date of the accident. TR 50. Mr. Green verified his signature on the accident report, but commented that he did not read the report before signing it because he trusted Mr. Minard to complete it properly. TR 52. He testified that Mr. Minard took the accident report to Miss Ruth, who was supposed to arrange a doctor's appointment for his shoulder. TR 29. Mr. Green testified that when he did not receive notice of an appointment, he inquired with Mr. Minard, who responded that the accident date was wrong on the report. TR 29. Mr. Green testified that Mr. Burgbacher subsequently questioned him about his visits to Dr. Green and told him that he made a mistake by going to see Dr. Green. TR 31.

Mr. Green then began seeing Dr. Meyer as a result of Dr. Green's referral. He stated that when he initially began seeing Dr. Meyer, he received cortisone shots that relieved some of his pain. TR 27. However, about six months after the injury, he started turning blue under his arm through his shoulder blade. TR 33. He testified that at this time he was no longer working as an oiler, because he had been demoted back to the barge cover handler position. TR 28, 33. He explained that a cover handler places 4,000 pound covers back on the barge with a team of two to three men. TR 16-17. He commented that the job also requires strenuous climbing and operating a bobcat. TR 16. He testified that Dr. Meyer took him off work for two months during 2002, and ADM did not pay him compensation. TR 32. Mr. Green testified that when Dr. Meyer recommended surgery, he did not want to have it and had avoided surgeries with his previous three injuries. TR 34-35.

Mr. Green testified that he underwent shoulder surgery by Dr. Meyer in July 2003. TR 40. He recalls that approximately six months after the surgery, he was released to perform light duty work. TR 41. Mr. Green testified that Dr. Meyer notified ADM of the light duty restriction and that he personally handed the document to Miss Ruth. TR 37. Mr. Green testified that ADM did not give him a light duty job, nor did ADM ever pay him any worker's compensation. TR 39, 42.

Mr. Green testified that he received job listings from Dr. Stokes three days prior to the hearing. TR 43. He testified that he did not investigate any of the jobs because he could not perform those types of jobs. TR 44. He communicated that he felt like he should not be required to work anymore because he was injured. TR 44. He testified that he worked hard when he was able, but now he is in pain and should not have to work. TR 44, 60. He also testified that he has not looked for any work since Dr. Meyer released him to return to work. TR 59.

John Minard

Mr. Minard is a maintenance superintendent at ADM, and he supervised Mr. Green in 2002. TR 88. He testified that all workers at the plant are aware of the policy that they must report an injury as soon as it occurs, regardless of how minor the injury. TR 88. He testified that he has never counseled employees not to report an accident. TR 89. However, he did testify that he encourages employees who work under him not to get hurt. TR 93.

Mr. Minard verified that he completed an accident report for Mr. Green on July 29, 2002. TR 89. He testified that he wrote the accident date of June 26, 2002 and was sure that Mr. Green gave him that date. TR 89-90. Mr. Minard testified that Mr. Green told him he had seen a doctor for a non-work related injury, and the doctor examined his shoulder injury and found a problem. TR 90. Mr. Minard did not recall Mr. Green reporting the accident to him on May 29, 2002. TR 90. He testified that if Mr. Green had reported an injury, he would have completed an accident report or referred him to Mr. Burgbacher. TR 90.

Mr. Minard testified that ADM had a point system, where employees acquired points whenever they missed work, a total of 14 points resulting in termination. TR 91. He verified a document showing that on July 30, 2002, Mr. Green had accumulated ten points. TR 91.

David Burgbacher

In May through July of 2002, Mr. Burgbacher was the safety director for the ADM Ama, Louisiana location. TR 95. He testified that the company communicates its policy to all employees that they must report an accident immediately, no matter how minor. TR 96. He stated that employees are supposed to file an accident report before the end of the shift during which the injury occurs. TR 96. He testified that Mr. Green should have reported his accident to Mr. Minard that same day. Mr. Burgbacher stated that Mr. Green could have reported the accident to him (Mr. Burgbacher), even if he had to call him at home. TR 96.

Mr. Burgbacher testified that the first time he heard of Mr. Green's accident was on July 29, 2002 when Mr. Minard contacted him to inform him that Mr. Green had reported an accident occurring on June 26, 2002. TR 97. He stated that on July 29, 2002, Mr. Green told him in person that he had had an accident on June 26, 2002. TR 97. He testified that an investigation was not conducted because the accident was over one month old, there were no witnesses and the scene could not be inspected. TR 97. Mr. Burgbacher stated that he obtained the record of Mr. Green's June 3, 2002 visit to Dr. Green and that the date raised a red flag for him. TR 98-99.

Mr. Burgbacher testified that Mr. Green was not demoted from his position as an oiler. He explained that the job title was eliminated when the company decided to hire contractors to perform the oiling. TR 100. He testified that Mr. Green was given the opportunity to bid for another position, and he came back as a barge cover handler because that was the only position for which he had seniority over the other employees. TR 101, 105. He testified that ADM had no light duty jobs available for Mr. Green because they had been required to outsource their security guard positions. TR 101.

II. MEDICAL EVIDENCE: Reports

Dwight A. Green, M. D.

Mr. Green first saw Dr. Green at Ochsner Clinic on June 3, 2002. The records reflect that Mr. Green complained of diarrhea and right shoulder pain. RX-8, p. 213. The records document that he had been experiencing right shoulder blade pains for two weeks. RX-8, p. 213. Mr. Green returned to Dr. Green on June 17, 2002 for shoulder x-rays. Dr. Green indicated that the shoulder had improved, but had a mild flare. RX-8, p. 215. He restricted Mr. Green from heavy lifting and instructed him to return in one month. RX-8, p. 216. On August 16, 2002, Mr. Green was still experiencing shoulder pain. On this date, the records include that the shoulder injury was a work injury occurring on May 28, 2002. RX-8, p. 217. Dr. Green maintained the restriction against heavy lifting and referred Mr. Green to an orthopedist. RX-8, p. 218.

Peter Stevens, P.A.

Mr. Green saw Physician's Assistant Stevens at the orthopedics department of Ochsner Clinic on September 10, 2002 complaining of continued shoulder pain. RX-8, p. 222. Stevens recorded that Mr. Green did not recall any sharp or stabbing onset of pain, but the pain gradually developed into a constant pain as a result of his work activity. RX-8, p. 222. Mr. Green was also experiencing night time pain. RX-8, p. 222. Stevens administered a steroid injection into Mr. Green's right shoulder and recommended physical therapy. RX-8, p.223. Mr. Green returned on November 4, 2002 stating that he had pain relief for three weeks from the injection but that his pain had returned. RX-8, p. 29. Stevens ordered an MRI and gave him a restriction from work. RX-8, p. 29. The MRI indicated a tear with significant degenerative change of the AC joint. RX-8, p. 30. Stevens noted significant impingement of the right shoulder with probable partial rotator cuff tear. RX-8, p. 30. Stevens again ordered physical therapy. RX-8, p. 30. On December 13, 2002, Stevens gave Mr. Green another steroid injection and released him back to work as of December 30, 2002. RX-8, p. 33. Mr. Green returned to the clinic on March 24, 2003. He said that the steroid injection, physical therapy and rest from not

working had allowed his shoulder to become asymptomatic; however, once he returned to work, he again experienced a gradual increase in pain. RX-8, p. 34. Stevens believed Mr. Green likely had a tear in his rotator cuff and referred him to an orthopedic surgeon. RX-8, p. 34.

River Region Rehab

Mr. Green underwent physical therapy treatment for his shoulder at River Region Rehab from November 18, 2002 through December 23, 2002. CX-1. Mr. Green concluded physical therapy with "limited progress" due to his pain which limited his activities. CX-1, pp. 5-6.

Mark S. Meyer, M.D.

Dr. Meyer first saw Mr. Green on April 14, 2003 as a result of Mr. Stevens' referral. RX-8, p. 35. After reviewing the MRI, Dr. Meyer's impression was the Mr. Green had a rotator cuff tear, he spoke with Mr. Green about surgery, and Mr. Green agreed to proceed. RX-8, pp. 35-36. On May 29, 2003, Dr. Meyer noted that the surgery had been delayed because Mr. Green was trying to have the surgery as a worker's comp claim. The claim had failed, but they would proceed with surgery. RX-8, p. 37. Dr. Meyer performed a right shoulder open acromioplasty and rotator cuff repair on July 8, 2003. RX-8, pp. 59-60. The rotator cuff tear was positively identified and repaired during surgery. RX-8, pp. 59-60. Dr. Meyer followed up with Mr. Green monthly after the surgery. RX-8, pp. 41-45. On October 6, 2003, he released him to work light duty for two months. RX-8, p. 45. On December 8, 2003, Mr. Green had continued stiffness in his shoulder; Dr. Meyer placed him at light duty for one month and if light duty was not available, then no work with overhead lifting. RX-8, p. 2. He also recommended physical therapy for rotator cuff strengthening. RX-8, p. 2. Dr. Meyer placed Mr. Green at MMI on January 12, 2004. His permanent restrictions were no overhead work or lifting and a twenty to thirty pound lifting maximum. RX-8, p. 5. In a follow-up visit on June 30, 2004, Dr. Meyer restricted Mr. Green from lifting greater than twenty pounds. CX-2, p. 2.

John G. Burvant, M.D.

Dr. Burvant performed an independent medical examination of Mr. Green on behalf of ADM on July 2, 2003. CX-3. He took Mr. Green's history and reviewed his medical records, including the MRI. CX-3, p. 1. His impression was that Mr. Green had evidence of rotator cuff tendonitis, a possible tear, and AC arthritis and impingement. CX-3, p. 2. Dr. Burvant opined that, assuming Mr. Green had the steroid injections and physical therapy as described, it was reasonable to proceed with a shoulder arthroscopy, subacromial decompression, possible distal clavicle excision and possible rotator cuff tear, if the tear was identified. CX-3, p. 2.

III. VOCATIONAL EVIDENCE: Testimony and Reports

Larry Stokes

Dr. Stokes is a vocational rehabilitation counselor. TR 65. He opined that given Dr. Meyer's restrictions, Mr. Green would not be able to return to his employment as a cover handler or an oiler. TR 69. He also opined that Mr. Green could not return to any of his past jobs, such as maintenance worker, construction laborer or corrosion technician. TR 69. Dr. Stokes created a report on August 25, 2004, indicating jobs within Mr. Green's geographic area that were within his physical and mental capabilities. RX-9, p. 9. He indicated a part-time/full-time unarmed security guard position at Merchant Security Services with weekly wages ranging from $246.40 to $340.88. RX-9, p. 9. The duties included patrolling property, securing buildings, and completing reports; it required sitting, standing and walking, occasional stooping and bending, and maximum lifting of 20 to 30 pounds with no overhead lifting. RX-9, pp. 9-10. Dr. Stokes indicated another unarmed security guard position at Weiser Security with weekly wages ranging from $246.60 to $314.40. RX-9, p. 10. The job required alternate sitting, standing, and walking and occasional bending with no lifting requirements. RX-9, p. 10. Dr. Stokes next indicated a full-time custodian position at Treasure Chest Casino with weekly wages ranging from $280.00 to $341.60. RX-9, p. 10. Duties were housekeeping, sweeping and mopping; physical requirements were alternate sitting, standing and walking, occasional stooping and bending, and ability to lift 20 pounds. RX-9, p. 10. The next position was as a cashier at Safari Car Wash with weekly wages ranging from $233.20 to $283.60. RX-9, p. 10. Duties included customer service, handling payments, occasional cleaning and stocking. It was a part-time position that required alternate sitting, standing, walking, stooping and bending, and maximum lifting of 20 to 30 pounds with no overhead lifting. RX-9, p. 10. The last position indicated was as a cashier at Apcoa, Inc. with weekly wages ranging from $233.20 to $283.60. The duties included collecting money while sitting and occasional cleaning. It was a part-time sedentary position with occasional stooping and bending and no lifting requirements. RX-9, p. 10. Dr. Meyer approved all of the above-mentioned jobs. RX-9, pp. 15-17. Dr. Stokes indicated that the second unarmed security guard job at Weiser Security had been available on January 7, 2004 and that the other types of jobs were generally open on a regular basis. TR 77. Dr. Stokes testified that he sent Mr. Green's attorney a report including the available jobs on September 13, 2004. TR 80.

IV. OTHER EVIDENCE: Records

Personnel File

Mr. Green's ADM personnel file evidences that he was absent from work from November 6, 2002 through December 31, 2002, the dates physician's assistant Stevens

restricted him from working. RX-5, p. 41. Mr. Green returned to work on January 1, 2003. RX-5, p. 42. He took sick days on July 7 and July 8, 2003, which coincide with the date of his shoulder surgery. RX-5, p. 42. The file reflects that Mr. Green never returned to work after the surgery. RX-5, p. 42.

Mr. Green's ADM personnel file also reflects that he was notified of excessive absences, amounting to ten points, on July 31, 2002. RX-5, p. 19. The notification also stated that the accumulation of fourteen points would result in termination. RX-5, p. 19.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221 (1994).

JURISDICTION AND COVERAGE

This dispute is before the Court pursuant to 33 U.S.C. §919(d) and 5 U.S.C. §554, by way of 20 C.F.R. §§ 702.331 and 702.332. See Main v. Brady-Hamilton Stevedore Co., 18 BRBS 129, 131 (1986).

In order to demonstrate coverage under the Longshore and Harbor Workers' Compensation Act, a worker must satisfy both a situs and a status test. Herb's Welding, Inc. v. Gray, 470 U.S. 414, 415-16, 105 S.Ct. 1421, 1423, 84 L.Ed. 2d 406 (1985); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 73, 100 S.Ct. 328, 332, 62 L.Ed. 2d 225 (1979). The situs test limits the geographic coverage of the LHWCA, while the status test is an occupational concept that focuses on the nature of the worker's activities. Bienvenu v. Texaco, Inc., 164 F.3d 901, 904 (5th Cir. 1999); P.C. Pfeiffer Co., 444 U.S. at 78, 100 S.Ct. at 334-35, 62 L.Ed.2d 225.

The situs test originates from §3(a) of the LHWCA, 33 U.S.C. § 903(a), and the status test originates from §2(3), 33 U.S.C. § 902(3). See P.C. Pfeiffer Co., 444 U.S. at 73-74, 100 S.Ct. at 332, 62 L.Ed. 2d 225. With respect to the situs requirement, § 3(a) states that the LHWCA provides compensation for a worker whose "disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)." Id. With respect to the status requirement, § 2(3) defines an "employee" as "any person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . ." Id. To be eligible for compensation, a person must be an employee as defined by § 2(3) who sustains an injury on the situs defined by § 3(a). Id.

In this case, the parties do not contest jurisdiction under the Act. At the time of his alleged injury, Claimant was employed as a laborer at a grain elevator, loading grain to and from vessels on the Mississippi River in Ama, Louisiana. JX-1. Therefore, the Court finds that jurisdiction under the Act is proper for this case.

TIMELINESS

Section 12(a) of the Act provides in part:

Notice of an injury or death in respect of which compensation is payable under this chapter shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment…. Notice shall be given (1) to the deputy commissioner in the compensation district in which the injury or death occurred, and (2) to the employer. 33 U.S.C. § 912(a).

Pursuant to § 12(b) of the Act, such notice shall be in writing and include the employee's name and address and a statement of the time, place, nature, and cause of the injury. 33 U.S.C. § 912(b).

In the instant case, Employer did not receive formal notice of Claimant's accident within thirty days of the date of the injury. Claimant filed formal notice with Employer in the form of an accident report on July 29, 2002. RX-10. Claimant and Employer dispute the date of the injury, Claimant alleging May 28, 2002 and Employer alleging June 26, 2002. Regardless, both alleged dates are greater than thirty days prior to the date Employer received formal notice of injury from Claimant. Therefore, the Court finds that Claimant failed to meet the notification requirements of § 12(a).

Claimant's failure to comply with §12(a), however, does not bar the present claim. Pursuant to § 12(d) of the Act, failure to give formal notice shall not bar the claim if (1) the employer or carrier had knowledge of the injury or death, (2) the employer or carrier has not been prejudiced by the claimant's failure to give such notice, or (3) the failure is excused on the grounds that (i) notice was provided, but to the wrong official, with no prejudicial effects, or (ii) some satisfactory reason exists that notice could not be provided. 33 U.S.C. § 912(d). In the absence of evidence to the contrary, it is presumed, pursuant to Section 20(b) of the Act, that the employer has been given sufficient notice under Section 12. See 33 U.S.C. § 920(b); Cox v. Brady-Hamilton Stevedore Co., 25 BRBS 203 (1991); Shaller v. Cramp Shipbuilding and Dry Dock Co., 23 BRBS 140 (1989). Accordingly, the employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim due to the claimant's failure to provide adequate notice. See Cox v. Brady-Hamilton Stevedore Co., 25 BRBS 203; Bivens v. Newport News Shipbuilding and Dry Dock Co., 23 BRBS 233 (1990).

In this case, the dispute between the parties arises out of the first §12(d) exception, the employer's knowledge of the injury during the thirty day period. An employer has knowledge under § 12(d)(1) if it knows of the injury and of such facts so that a reasonable man would consider that compensation liability was possible and that further investigation should be made. Pardee v. Army & Air Force Exch., 13 BRBS 1130, 1137 (1981). The parties take opposing positions regarding when Employer gained knowledge of the injury and when the accident occurred. Claimant testified that he was injured at work on May 28, 2002 and orally notified his supervisor, Mr. Minard, on May 29, 2002. TR 22-23. In response, Employer presented Mr. Minard as a witness, who testified that Claimant did not orally notify him of the injury. TR 90. Employer alleges that it had no knowledge of the injury until the accident report was filed on July 29, 2002. It proffers that June 26, 2002 is the correct accident date as it appears on the accident report and that Claimant fabricated the May 28, 2002 date. If the Court accepts Claimant's testimony as true, Claimant orally notified Employer of his injury one day after it occurred and Employer is imputed with § 12(d)(1) knowledge. See Matthews v. Jeffboat, Inc., 18 BRBS 185 (1986) (holding that an employer had knowledge where the administrative law judge found claimant had orally notified his leadman of the injury). However, if the Court discredits Claimant's testimony and accepts Employer's argument that the injury occurred on June 26, 2002, then Employer did not have knowledge of the injury within the thirty day time period.

Based on the evidence as a whole, the Court accepts Claimant's testimony as true and finds that Employer had knowledge of Claimant's injury on May 29, 2002. At the formal hearing, the Court found Claimant to be a credible witness. His testimony related a believable account as to why he did not file an accident report on the day of his injury. He indicated that he initially believed the sting in his shoulder to be a minor injury that would resolve on its own, and he treated himself by taking his son's pain pills. TR 23-24.

However, when his shoulder was still in pain the following day, he orally notified his supervisor. TR 23. He explained that he did not file an accident report because he trusted Mr. Minard to make a note of it and thought he could file the accident report later if needed. TR 22-24, 30. Claimant testified that he was hesitant to unnecessarily make a record of his injury due to the ramifications it would have on Mr. Minard. TR 24. The Court found this testimony to be sincere. Claimant had been an employee of ADM since 1994 and his tenure there lends credence to his testimony that he thought he was helping the company by not filing a report. TR 16-17, 24. Additionally, Mr. Minard's testimony that employees were encouraged not to get hurt evidences that his employees were at least generally aware that injuries had a negative effect on the company. TR 93. For the foregoing reasons, the Court accepts Claimant's testimony, even in light of Mr. Minard and Mr. Burgbacher's conflicting testimony that they first learned of Claimant's work injury claim on July 29, 2002. TR 89-90, 97.

The Court also accepts Claimant's testimony despite Employer's unsuccessful attempt to discredit him. Employer's brief alleges various "lies" told by Claimant; however, the Court finds none of these allegations to be valid. Employer alleges that Claimant lied when he testified that he was demoted from his oiler position to the barge cover handler position and that he was denied a light duty security job, when, in fact, the company had outsourced both positions. The Court finds that Claimant's testimony merely demonstrates that he did not understand that the positions at issue had been eliminated; this testimony does not amount to deception and is not a basis for discrediting his other testimony. Employer also asserts that Claimant lied when he testified that he told Dr. Green on June 3, 2002 that he had injured his shoulder at work. Employer's support for this argument is that no notation of the work-relatedness of the injury appears in the medical record. The Court does not believe that the absence of such a notation in the record positively refutes that Claimant discussed the work-relatedness of the injury with the doctor. Claimant testified that he initially told Dr. Green not to record the shoulder injury as work-related because he had to go through the company doctor, thus explaining why it would not appear on the record. TR 25. Employer lastly implies that Claimant changed his injury on August 16, 2002 from a shoulder injury to a back injury, because the record reflects that he reported pulling his back at work. Again, the Court finds Employer's allegation to be false. The record clearly shows that in Claimant's previous visits to Dr. Green, he had described his shoulder injury as extending into the scapular area of his back. RX-8, pp. 213-216. The Court finds it obvious that the reference to Claimant's back in the medical records is clearly intended to relate to the scapular area of his back near his shoulder. In conclusion, the Court finds Employer's allegations speculative at best and ineffective in discrediting Claimant's testimony.

Employer also argues that Claimant offered several dates on which the accident allegedly occurred. The Court finds this argument to be a mischaracterization of the facts of record. The record establishes that Claimant has claimed only one date, May 28, 2002.[4] Claimant testified to this date at trial, the records of Dr. Green, Dr. Burvant, and River Region Physical Therapy contain May 28, 2002 as the date of injury, and the records of Dr. Meyer also indicate that Claimant was injured in May 2002. TR 21; RX-8, pp. 35, 217; CX-1, p. 3; CX-3, p. 1. The sole date discrepancy in the record is June 26, 2002, as contained in the accident report and the testimony of Mr. Minard and Mr. Burgbacher. However, the Court has already discussed this divergence and has credited Claimant's testimony. Lastly, Employer makes much of the fact that Claimant could not recall the day of the week on which the accident occurred. However, the Court finds it reasonable that Claimant may not recall the day of the week of an accident that occurred over two years ago.

Even if Employer did not have knowledge of the injury, the second § 12(d) exception provides that if the employer was not prejudiced by claimant's untimely notice of injury, claimant's untimely notice is excused. Therefore, the employer must show that it suffered prejudice by claimant's untimely notice. 33 U.S.C. §912(d)(2). See Addison v. Ryan-Walsh Stevedoring Co., 22 BRBS 32, 34 (1989); Sheek v. General Dynamics Corp., 18 BRBS 151 (1986). Prejudice is established when the employer demonstrates substantial evidence that the claimant's failure to give timely notice of the injury has impeded its ability to investigate to determine the nature and extent of the alleged illness or to provide medical services. See Strachan Shipping Co. v. Davis, 571 F.2d 968, 972 (5th Cir. 1978). A generalized claim of not being able to investigate while the claim is fresh is insufficient to prove prejudice. See Ito Corp. v. Director, OWCP, 833 F.2d 422, 22 BRBS 126 (CRT) (5th Cir. 1989).

The Court finds that Employer was not prejudiced by Claimant's untimely notice. Employer received formal notice of Claimant's injury on July 29, 2002. At this point, Claimant had only seen Dr. Green twice, and Employer was afforded an opportunity to become involved in the provision of medical services. Claimant testified that he awaited an appointment with the company doctor after filing the accident report. TR 29. However, he did not receive any assistance from Employer, so he continued receiving treatment through Dr. Green. Additionally, the Court finds that Employer's ability to investigate the accident was not altered by the late notice. Mr. Green worked by himself; therefore, there were no witnesses to interview. TR 19, 97. The scene of the accident

[4] Employer submits that Claimant claimed May 20, 2002 as the date of injury in his deposition. However, Claimant cites another portion of the deposition where he related May 28, 2002 as the date of injury. At the hearing, Claimant was surprised that May 20, 2002 appeared in the deposition and insisted that the correct date was May 28, 2002. TR 54. Neither party submitted the deposition into evidence, precluding the Court from viewing the deposition in its entirety to determine the context of this inconsistency. Therefore, the Court will not consider Claimant's deposition testimony in its analysis.

had not changed since the date it occurred; Mr. Burgbacher testified that at the time he was notified of the accident, the same oil buckets as the one involved in the accident were still available. TR 104. Claimant's delay in notifying Employer did not alter the conditions under which Employer could have conducted an investigation.

For the foregoing reasons, the Court will excuse Claimant's untimely notice of injury pursuant to § 12(d) and will consider Claimant's claim to be timely for the purposes of the Act.

FACT OF INJURY AND CAUSATION

The claimant has the burden of establishing a *prima facie* case of compensability. He must demonstrate that he sustained a physical and/or mental harm and prove that working conditions existed, or an accident occurred, which could have caused the harm. Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336, 338 (1981); U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318, 71 L.Ed. 2d 495 (1982). Once the claimant establishes these two elements of his *prima facie* case, § 20(a) of the Act provides him with a presumption that links the harm suffered with the claimant's employment. See Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 143 (1990). When an employee sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside of work, the employer is liable for the entire disability and for medical expenses during both injuries if the subsequent injury is the natural and unavoidable result of the original work injury. See Atlantic Marine v. Bruce, 661 F.2d 898, 901, 14 BRBS 63,65 (5th Cir. 1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454, 456-57 (9th Cir. 1954); Mijangos v. Avondale Shipyards, 19 BRBS 15, 17 (1986).

In this case, Claimant has established that he suffered a shoulder injury. The medical records of Drs. Green, Meyer, and Burvant document such injury. CX-3, RX-8. Claimant underwent shoulder surgery for a rotator cuff tear by Dr. Meyer on July 8, 2003. RX-8, pp. 59-60. Claimant also proved that working conditions existed that could have caused such an injury. Claimant testified that his position required him to routinely carry a five gallon bucket of oil while climbing stairs. TR 18-19. Carrying such a bucket in awkward positions could have caused a tear to Claimant's rotator cuff. Therefore, the Court finds that Claimant has established a *prima facie* case of compensability and is entitled to the § 20(a) presumption.

After the § 20(a) presumption has been established, the employer must introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903. Only after the employer offers substantial evidence does the presumption disappear. Del Vecchio v. Bowers, 296 U.S. 280, 286, 56 S.Ct. 190, 193 (1935). Substantial

evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the presumption disappears, and the issue of causation must be resolved based upon the evidence as a whole. Kier v. Bethlehem Steel Corp. 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991).

To rebut the § 20(a) presumption, the Employer must present evidence such that a reasonable mind could accept the conclusion that Claimant's injury did not arise out of his employment. The Court finds that Employer did not meet this burden. First, Employer argues that Claimant actually fabricated his injury at work. Employer alleges that Claimant had a motive to fabricate the accident because he had excessive absences and knew his job was in danger. Employer submitted evidence that Claimant was notified of excessive absences on July 30, 2002. RX-5, p. 19. However, Employer's argument fails, because Claimant filed the accident report on July 29, 2002, which was prior to receiving notice of his excessive absences. Employer offers no further evidence to show that Claimant was in danger of being terminated or that Claimant was concerned about his job security. Second, Employer points out alleged inconsistencies in Claimant's medical records to argue that Claimant's injury was not work-related. Employer refers to Dr. Green's report of June 3, 2002 that recorded two weeks of shoulder pain and to the absence of the work-relatedness of the injury from the medical records until August 16, 2002. The Court does not find this to be substantial evidence that Claimant's injury was not work-related. The Court acknowledges that Claimant's accident date of May 28, 2002 was one week, rather than two weeks, prior to his June 3, 2002 visit to Dr. Green. However, the difference of one week does not sway that Court that the injury was not work-related. Notably, no witness, including Claimant, was asked to testify regarding this difference or to validate that what Claimant related to the doctor or nurse is what was actually recorded. Regarding the absence of the work-relatedness of the injury in Claimant's two visits prior to August 16, 2002, the records neither affirm nor deny that the injury was work-related. Further, Claimant's testimony that he initially told Dr. Green not to record the shoulder injury as work-related, because he had to use the company doctor, explains why the injury was not initially documented as work-related. TR 25. While Employer does raise minor inconsistencies, without further evidence, the Court cannot conclude that Claimant's injury was not work-related.

The Court additionally finds that even if Employer had rebutted the § 20(a) presumption, the evidence as a whole resolves in favor of Claimant to establish causation. Employer has not presented any evidence concerning an alternate cause of the shoulder injury, while the Court has credited Claimant's testimony that his shoulder injury occurred as a result of lifting a five-gallon oil bucket onto a step at work. The inconsistencies presented by Employer are minor and provide insufficient weight against a finding of causation.

NATURE AND EXTENT OF SCHEDULED DISABILITY

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5, (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. Louisiana Ins. Guar. Ass'n. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

In this case, the parties have stipulated that Claimant reached maximum medical improvement on January 2, 2004. See JX-1. However, Dr. Meyer's records show that he placed Mr. Green at MMI on January 12, 2004. RX-8, p. 5. Based upon Dr. Meyer's records, the Court finds the parties' stipulation to be in error and finds January 12, 2004 to be the date when Claimant's disability became permanent.

The extent of disability can be either partial or total. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989). If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If the employee does not prove this, then at the most, his disability is partial and not total. See 33 U.S.C. § 908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985).

Claimant clearly cannot return to his usual employment at ADM. Dr. Meyer permanently restricted Claimant from all overhead lifting and from lifting greater than twenty to thirty pounds. RX-8, p. 5. Dr. Stokes, the vocational rehabilitation specialist, opined that given Dr. Meyer's restrictions, Mr. Green would not be physically capable of performing the duties of a cover handler or an oiler. TR 69. Therefore, the Court finds that Claimant has established a *prima facie* case of total disability.

The Court finds that Employer demonstrated suitable alternative employment through Dr. Stokes' testimony and labor market survey. The survey identified five potential employment opportunities available as of August 25, 2004 in Claimant's geographical area based on his age, education, training and experience, and physical capabilities. RX-9. Dr. Stokes indicated an unarmed security guard position at Merchant Security Services with a twenty to thirty pound lifting requirement, an unarmed security guard position at Weiser Security with no lifting requirement, a custodian position at Treasure Chest Casino with a twenty pound lifting requirement, a cashier position at Safari Car Wash with at twenty to thirty pound lifting requirement, and a cashier position at Apcoa, Inc. with no lifting requirement. RX-9. Dr. Meyer approved all of the jobs as

within Claimant's physical capabilities.[5] RX-9, pp. 15-17. Dr. Stokes also indicated that the unarmed security guard position at Weiser Security was available on January 7, 2004. TR 77. As of January 7, 2004, Claimant had not received his permanent lifting restrictions, but was restricted to light duty work. RX-8, p. 2. Dr. Stokes classified the Weiser Security job as a sedentary/light demand position, and it required alternating between sitting, standing, and walking, occasional bending and no lifting. The Court finds that this position met Claimant's restriction of light duty work and was suitable alternative employment for Claimant on January 7, 2004. On January 12, 2004, Dr. Meyer released Claimant from the light duty work restriction and gave him permanent restrictions of no overhead lifting and no lifting greater than twenty to thirty pounds. RX-8, p. 5. Therefore, the Court finds that as of August 25, 2004, the other four positions also qualified as suitable alternative employment.

The Court finds that Claimant did not meet his burden of proving a diligent search and willingness to work. Claimant admitted that he had not looked for any work since being released by Dr. Meyer to do light duty work. TR 59. He also indicated that he did not intend to look for any work and that he felt that he should not have to work. TR 44, 60. Claimant's failure to prove a diligent search reduces his benefits to partial as of the date Employer first showed suitable alternative employment, January 7, 2004.

Claimant was first restricted from work on November 4, 2002 by P.A. Stevens. RX-8, p. 29. He was then released to return to work on December 30, 2002. RX-8, p. 33. The records reflect that Claimant did not work from November 6, 2002 through December 31, 2002 in accordance with these restrictions. RX-5, p. 41. Claimant then worked from January 1, 2003 through July 8, 2003 and did not return.[6] He underwent surgery on July 8, 2003 and was restricted from work until October 6, 2003 when Dr. Meyer released him to light duty work. RX-8, p.45. He was then placed at MMI on January 12, 2004 and received permanent restrictions of no overhead lifting and no lifting greater than twenty to thirty pounds. RX-8, p. 5.

In light of the foregoing, the Court finds that Claimant is entitled to temporary total disability from November 6, 2002 through December 31, 2002 and July 9, 2003 through January 6, 2004. He is entitled to temporary partial disability from January 7, 2004 through January 11, 2004 and permanent partial disability from January 12, 2004 and continuing.

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[5] Claimant argues that Dr. Meyer restricted Claimant to a twenty pound lifting maximum on June 30, 2004, thus eliminating the positions with twenty to thirty pound lifting requirements. CX-2, p. 2. However, Dr. Meyer's subsequently approved all five jobs, indicating that Claimant was capable of the physical requirements. RX-9, p. 15-17. Consequently, the Court accepts Dr. Meyer's approval of the jobs despite the discrepancy in the restrictions.

[6] The personnel file reflects that Claimant used sick days on July 7 and July 8, 2003, for which he would have received a regular day's compensation.

WAGE-EARNING CAPACITY

The determination of post-injury wage-earning capacity in cases of permanent partial disability is governed by §§ 8(c) and 8(h) of the Act, 33 U.S.C. §§ 908(c) and 908(h). La Faille v. Benefits Review BD., 884 F.2d 54, 60, 22 BRBS 108, 118 (CRT)(2nd Cir. 1989). Because Claimant's injury is not of a kind specifically identified in the schedule set forth in §§ 8(c)(1)-(20), it falls under § 8(c)(21). 33 U.S.C. §§ 908(c)(1)-(21). Under § 8(c)(21), compensation is set at 66 2/3 percent of the difference between claimant's average weekly wages at the time of the injury and his post-injury wage-earning capacity, as determined pursuant to § 8(h) of the Act. Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691, 693 (1980); 33 U.S.C. § 908(c)(21).

Section 8(h) provides in part that post-injury wage-earning capacity shall be determined by claimant's actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity. Bethard, 12 BRBS at 693; 33 U.S.C. § 908(h). However, if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the Court may, in the interest of justice, fix such wage earning capacity as shall be reasonable, having due regard to the nature of the employee's injury, the degree of physical impairment, the employee's usual employment, and any other factors or circumstances which may affect the employee's capacity to earn wages in a disabled condition, including the effect of disability as it may naturally extend into the future. 33 U.S.C. § 908(h). Furthermore, §§ 8(c)21 and 8(h) of the Act require that the wages earned in a post injury job be adjusted to account for inflation in order to represent the wages that job paid at the time of the claimant's injury, insuring that wage-earning capacity is considered on an equal footing with the determination under § 10 of average weekly wage at the time of the injury. Richardson v. General Dynamics Corp., 19 BRBS 48, 49-50 (1986); Bethard, 12 BRBS at 695; La Faille, 884 F.2d at 61, 22 BRBS at 120. The Benefits Review Board has held that the percentage increase in the National Average Weekly Wage ("NAWW") for each year should be used to adjust a claimant's post-injury wages for inflation. Richardson v. General Dynamics Corp., 23 BRBS 327, 330-31 (1990). In addition, a court may average the hourly wages of jobs found to be suitable alternative employment in order to calculate wage-earning capacity. Avondale Industries v. Pulliam, 137 F.3d 326, 328, 32 BRBS 65, 67 (5th Cir. 1998).

In the present case, Employer showed one suitable employment opportunity for Claimant available on January 7, 2004 at Weiser Security. Dr. Stokes indicated that the position paid a weekly wage ranging from $246.60 to $340.88. RX-9, p. 10. The Court takes the median weekly wage from this range to find that Claimant's wage-earning capacity on January 7, 2004 was $293.64 per week. The Court further finds that Claimant's release to perform more strenuous work on January 12, 2004 did not increase his wage earning capacity, because the other four positions indicated by Dr. Stokes paid

similar wages. RX-9. The Board has held that the percentage increase in the National Average Weekly Wage ("NAWW") for each year should be used to adjust a claimant's post-injury wages for inflation. Quan v. Marine Power & Equipment Co., 30 BRBS 124, 127-28 (1996); Richardson v. General Dynamics Corp., 23 BRBS 327, 330-31 (1990). The NAWW for January 2004 is $515.39, and the NAWW for May 2002, the date of Claimant's injury, is $483.04. United States Dept. of Labor, Employment Standards Administration (February 22, 2004). Adjusting the January 2004 average weekly wage of $293.64 in consideration of the May 2002 NAWW, the Court finds that the proper wage-earning capacity for Claimant in May 2002 was $275.21 per week.[7] Therefore, the Court finds that the proper wage-earning capacity for Claimant in May 2002 wages is $275.21 per week.

REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

> (a) the employer shall furnish such medical, surgical, and other attendance or treatment, nurse or hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-58 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); see also Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'g 12 BRBS 65 (1980). An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; see also Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curiam), rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983). Once the employer has refused to provide treatment or to satisfy a claimant's request for treatment, the claimant is released from the obligation of continuing to seek employer's approval.

[7] The Court arrived at this figure by calculating the proportion: *x*/ $483.04 = $293.64/$515.39.

Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988). The claimant then need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury, in order to be entitled to such treatment at the employer's expense. Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

Because the Court has found that Claimant's injury was causally related to his employment, Claimant is entitled to past and future medical expenses arising out of his shoulder injury. Claimant filed an accident report on July 29, 2002 and requested medical treatment for his injury. TR 29. He testified that he did not receive a company-approved doctor's appointment and inquired about it to no avail. TR 29. The Court finds that Employer effectively refused to satisfy Claimant's request for treatment; therefore, Claimant was not required to continue seeking Employer's approval for treatment. The Court finds that Claimant's treatment by Dr. Green, P.A. Stevens, and Dr. Meyer was both reasonable and necessary, based on the medical records and upon the opinion of Dr. Burvant, Employer's independent medical examiner. CX-3. Accordingly, the Court awards Claimant reimbursement for any outstanding medical bills accrued after July 29, 2002 that arose out of his shoulder injury. Employer is also liable for Claimant's future reasonable and necessary medical expenses arising out of his shoulder injury.

ATTORNEY'S FEES

Under Section 28(a) of the Act, when an employer declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation and the claimant utilizes the services of an attorney at law in the successful prosecution of the claim, the employer will be liable for a reasonable attorney's fee. See 33 U.S.C. § 928(a). In this case, Employer did not pay Claimant any disability benefits. See JX-1. Because the Court has awarded Claimant compensation, the Court finds that Claimant is entitled to attorney's fees from Employer pursuant to Section 28(a) of the Act.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

1) Employer/Carrier shall pay to Claimant compensation for temporary total disability from November 6, 2002 through December 31, 2002 and July 9, 2003 through January 6, 2004, based on an average weekly wage of $687.01.

2) Employer/Carrier shall pay to Claimant compensation for temporary partial disability from January 7, 2004 through January 11, 2004 and permanent partial disability from January 12, 2004 and continuing, based on an average weekly wage of $687.01 to be reduced by a residual wage-earning capacity of $275.21.

3) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate shall be calculated as of the date of this Order at the rate provided by 28 U.S.C. Section 1961.

4) Employer/Carrier shall pay Claimant for all reasonable and necessary past and future medical expenses that are the result of Claimant's employment-related shoulder injury.

5) Claimant's counsel shall have thirty (30) days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have thirty (30) days from receipt of the fee petition in which to file a response.

6) All calculations necessary for the payment of this award are to be made by the OWCP District Director.

So ORDERED.

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RICHARD D. MILLS
Administrative Law Judge